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Nos. 93-1612, 93-1613

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONSBANK OF NORTH CAROLINA, N.A. and
NATIONSBANC SECURITIES, INC.,
Petitioners,

v.

VARIABLE ANNUITY LIFE INSURANCE CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN SUPPORT OF PETITIONERS FILED BY *AMICI CURIAE* CONFERENCE OF STATE BANK SUPERVISORS, COMMUNITY BANKERS ASSOCIATION OF NEW YORK STATE, FLORIDA BANKERS ASSOCIATION, INDEPENDENT BANKERS ASSOCIATION OF AMERICA, INDEPENDENT BANKERS ASSOCIATION OF TEXAS, KENTUCKY BANKERS ASSOCIATION, MISSISSIPPI BANKERS ASSOCIATION, SAVINGS & COMMUNITY BANKERS OF AMERICA, TEXAS BANKERS ASSOCIATION, and WESTERN INDEPENDENT BANKERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF THE *AMICI CURIAE*	3
REASONS FOR GRANTING THE WRIT	6
I. THE COURT OF APPEALS' ERRONEOUS CONSTRUCTION OF FEDERAL LAW WILL SEVERELY CONSTRICT ONGOING BANKING PRACTICES TO THE SERIOUS DETRIMENT OF BANKS AND THEIR CUSTOMERS	6
II. THE COURT OF APPEALS IGNORED CONGRESS' INTENT TO CREATE A FLEXIBLE BANKING SCHEME ADMINISTERED BY THE COMPTROLLER	8
III. THE COURT OF APPEALS MISINTERPRETED SECTION 92 IN CONFLICT WITH THIS COURT'S DECISIONS AND WITH THE TEXT OF THE STATUTE	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

American Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1988) 10
Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972) 9, 10
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 11
Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987) 11
Curtis v. Leavitt, 15 N.Y. 9 (1857) 9
First Nat'l Bank of Eastern Ark. v. Taylor, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990) 10
In re Howerton, 21 B.R. 621 (Bankr. N.D. Tex. 1982) 14
Independent Bankers Ass'n v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979) 15
Independent Ins. Agents v. Board of Governors of the Fed. Reserve Sys., 736 F.2d 468 (8th Cir. 1984) 15
Investment Co. Inst. v. Camp, 401 U.S. 617 (1971) .. 11
John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993) 12-14
M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977) 8, 10
New York State Ass'n of Life Underwriters v. New York State Dep't of Banking, 83 N.Y.2d 353, 1994 N.Y. LEXIS 324 (1994) 9
New York State Ass'n of Life Underwriters v. New York State Dep't of Banking, 190 A.D.2d 338, 598 N.Y.S.2d 824 (1993), *aff'd*, 83 N.Y.2d 353, 1994 N.Y. LEXIS 324 (1994) 9-10
In re Newman, 993 F.2d 90 (5th Cir. 1993) 14
SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959) 12, 13, 14
Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc., 399 F.2d 1010 (5th Cir. 1968) 10, 14, 15
Securities Industry Ass'n v. Clarke, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) 10
In re Young, 806 F.2d 1303 (5th Cir. 1987) 14

TABLE OF AUTHORITIES—Continued

STATUTES — Page

12 U.S.C. 24 Seventh ..... *passim*
12 U.S.C. 26 11
12 U.S.C. 92 ..... *passim*
12 U.S.C. 211(a) 11
12 U.S.C. 1818 11

MISCELLANEOUS

ASSOCIATION OF BANKS-IN-INSURANCE, FACT BOOK (1993) 6
Doyle C. Bartlett, *Playing the Wild Card*, 3 BANK INS. MARKETING 8 (1993) 8
OCC, Interpretive Letter No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985) 4
2B N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 51.01, 51.06 (5th ed. 1992) 9
Symons, *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676 (1983) 9

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Concerned with the broad public policy issues and the specific repercussions to financial institutions engendered by the decision of the court of appeals, *amici curiae* sup-

port the petitioners [1] in urging this Court to grant certiorari. This case presents important issues for consumers, for bank regulators, for all national and many state banks, and for the entire financial services industry. Together with *amici* that are filing separate briefs, *amici* represent virtually every commercial bank in the United States.

Respondent Variable Annuity Life Insurance Co. ("VALIC") is an insurance company seeking to restrain competition in the sale of annuities to consumers. If the decision below is permitted to stand, VALIC—benefitting from the court of appeals' failure to accord any deference to the expertise of the Comptroller of the Currency ("Comptroller") and from two procedural quirks [2]—could accomplish that objective nationwide, constricting the availability of annuities to consumers and causing irreparable injury to the banking industry. *Amici* respectfully join the petitioners in asking this Court to review

[1] The petitioners in No. 93-1612 are NationsBank of North Carolina, N.A. and NationsBanc Securities, Inc. The petitioners in No. 93-1613 are the United States and the Comptroller of the Currency. Citations to the appendices to the petition of NationsBank in No. 93-1612 are denoted by "App."

Pursuant to Supreme Court Rule 37, *amici* have requested and received consent to file this brief from counsel for petitioners and from counsel for respondent Variable Annuity Life Insurance Co. The original letters of consent to the filing of this brief have been filed with the Clerk of this Court.

[2] The first procedural quirk apparently permits VALIC to compel any national bank wishing to sell annuities to litigate the issue in VALIC's home district and circuit. *See* Petition of NationsBank, at 23 n.22; Petition of the United States, at 22-23.

The second quirk deprived the banking industry of the opportunity to have the issues heard *en banc* by the court of appeals. Even though four circuit judges sharply disagreed with and voted for rehearing *en banc* of the three-judge panel decision, the recusal of nearly half of the active Fifth Circuit judges meant that such consideration was denied. App. 19a n.*. The dissenting judges lamented the court's "serious error" in failing to review the case. App. 28a; *see* Petition of NationsBank, at 9-10; Petition of the United States, at 21-22.

the judgment of the Court of Appeals for the Fifth Circuit.

INTERESTS OF THE *AMICI CURIAE*

This case concerns the statutory authority for national banks to market annuities. The court of appeals fundamentally misconstrued the national banking scheme and reached a conclusion that ignores heretofore unquestioned pronouncements of this Court. In so doing, the court of appeals also improperly reviewed de novo the Comptroller's determination.

Amici include the national association of state banking regulators—the Conference of State Bank Supervisors—and national, regional, and state trade associations for the banking industry representing financial institutions of all sizes and types. The member institutions of *amici* associations are located in every state and the District of Columbia, and in major financial centers as well as in small communities and rural areas.

The *Conference of State Bank Supervisors* (CSBS) is the professional association of state government officials responsible for chartering and regulating more than 10,000 state-chartered banking institutions in the fifty states and in Guam, Puerto Rico, and the Virgin Islands. CSBS joins this brief out of specific concern about the important policy consequences of the court of appeals' decision and the impact of the decision on the supervisory authority of bank regulators over state-chartered banks.

The *amici* associations represent many financial institutions that currently sell annuities. These *amici* and their members are directly and adversely affected by the court of appeals' erroneous decision. The decision—if allowed to stand—will have an immediate and destructive effect upon the substantial and profitable business of bank sales of annuities. Some institutions represented by *amici* have been marketing annuities for nearly a decade, in accordance with long-standing decisions of the Comptroller.

See, e.g., OCC, Interpretive Letter No. 331 [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501 (1985). Moreover, because of the commonplace incorporation by reference of national bank powers into state banking statutes (so-called wild card laws), the disposition of this case will affect the powers of numerous state-chartered banks as well. *Amici* include the following national and state associations whose members have a distinct interest in the outcome of this case:

The *Community Bankers Association of New York State* (CBANYS) is the principal trade association for savings institutions in New York. Its 129 members represent $126 billion in assets and include federal and state-chartered savings banks and savings and loans, and mutual and stock-owned savings and banking institutions.

The *Florida Bankers Association* (FBA) is the principal organization representing commercial banks in Florida. FBA's 321 members comprise 88% of the banks in the state, and these member banks hold 96% of the state's bank deposits.

The *Independent Bankers Association of America* (IBAA) is the only national trade association that exclusively represents the interests of the nation's community banks. The 5800 member institutions of IBAA serve a variety of communities—cities, suburbs and rural areas —in all fifty states and the District of Columbia.

The *Independent Bankers Association of Texas* (IBAT) is a trade association representing approximately 800 independently owned or community banks domiciled in the State of Texas. The IBAT membership includes both national and state-chartered institutions.

The *Kentucky Bankers Association* is a trade association of 300 national and state banks representing over 95% of the banking industry in Kentucky.

The *Mississippi Bankers Association* (MBA) (formally known as the Mississippi Association of Financial Institutions of Deposit, Inc.) is a trade association representing commercial banks in Mississippi. MBA comprises 114 commercial banks, which hold over 99% of the state's commercial banking assets.

Savings & Community Bankers of America (SCBA) is the national trade organization for the savings industry. Its 1900 members include federal and state-chartered institutions, stockholder or mutually-owned, throughout the United States. SCBA serves its members through technical assistance, educational products and programs, publications, meetings, and other activities that enhance the operations of savings institutions. Among other things, SCBA provides information to the officers and directors of its individual members on how to comply with the requirements of federal and state law and regulation.

The *Texas Bankers Association* (TBA) is the principal trade association for the commercial banking industry in Texas. TBA's members include over 900 federal and state-chartered banks within the state. The members include banks of all sizes located throughout Texas, including independent banks as well as members of multistate holding companies. TBA members account for approximately 95% of the deposits in Texas' commercial banking system.

Western Independent Bankers (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming, as well as American Samoa and Guam. WIB's members account for more than $34 billion in banking assets.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' ERRONEOUS CONSTRUCTION OF FEDERAL LAW WILL SEVERELY CONSTRICT ONGOING BANKING PRACTICES TO THE SERIOUS DETRIMENT OF BANKS AND THEIR CUSTOMERS.

As the four circuit judges dissenting from the denial of rehearing *en banc* noted: "No one can seriously question the importance of this case to the banking industry and to commerce and competition in general." App. 21a. For the banking industry, as the dissent put it, the panel's decision "seriously thwarts competition in a major market, with no indication that that is what Congress intended." App. 20a. The original three-judge panel accomplished this anticompetitive result by circumscribing the ability of banks to participate in the profitable and growing annuities market.

1. The anticompetitive consequences of which the dissent warned are straightforward: the court of appeals' revocation of banks' power to market annuities would leave customers with little choice but to purchase annuities through insurance agents and other non-bank distributors such as respondent VALIC.

Bank customers are the primary beneficiaries of bank annuity sales. The distribution of annuities by and through banks provides a convenient way for consumers to purchase such investment products. Indeed, recent statistics demonstrate that between 75% and 90% of customers purchasing annuities from banks were first-time buyers of these products. ASSOCIATION OF BANKS-IN-INSURANCE, FACT BOOK 7 (1993). By foreclosing bank annuity sales and thus constricting the consumer's opportunity to purchase annuities, the decision below makes the banking public the victim of its error.

Banks' ability to market annuities and similar investment products also benefits the banking system. Fees

generated by bank brokerage of annuities represent an increasingly important source of revenue for banks. Recent statistics provided by Kenneth Kehrer and Associates demonstrate that financial institutions more than tripled their annual annuity sales between 1987 and 1993, and that by 1993 annual annuity sales by financial institutions in the United States totalled *$13.5 billion*. In 1993 banks and thrifts accounted for 21.3% of individual annuity sales.

The sale of annuities by banks poses no risk to the financial security of banks because they act solely as agents for non-bank underwriters of the annuity policies. For the same reason, bank sales of annuities pose no risk to the Federal Deposit Insurance Fund. The Fifth Circuit's ruling curtails this source of revenue, seriously undermining the financial strength and competitiveness of banks, with no evidence that this is what Congress intended, App. 20a, and without appropriate deference to the views of the Comptroller.

The Comptroller's determination that petitioner NationsBank may market annuities is consistent with the procompetitive policies embodied in federal banking law and in our system of enterprise: "Customers will benefit from the increased range of products made available to them by [petitioner NationsBank]." App. 48a (Comptroller's ruling). That determination rests on the Comptroller's critical and expert analysis of the nature of annuities and the relevant provisions of the federal banking laws. App. 37a-48a. In substituting its own views for the reasonable interpretations of the Comptroller, the court of appeals constructed anticompetitive barriers that stifle the ability of banks to participate fully in the rapidly changing financial services marketplace.

2. The panel's decision nominally deals only with the powers of national banks under federal law but will directly affect many state-chartered banks as well. Many states have enacted so-called wild card statutes that em-

power their state-chartered banks to engage in banking activities to the same extent as permissible for national banks. Doyle C. Bartlett, *Playing the Wild Card*, 3 BANK INS. MARKETING 8-9 (1993) (identifying 38 "wild card" states). Accordingly, the court of appeals' limitation upon the power of national banks also limits the powers of banks chartered by many states. This Court should review the Fifth Circuit's faulty conclusion on this important question of federal law.

II. THE COURT OF APPEALS IGNORED CONGRESS' INTENT TO CREATE A FLEXIBLE BANKING SCHEME ADMINISTERED BY THE COMPTROLLER.

In overturning the Comptroller's determination and in interpreting 12 U.S.C. 24 Seventh narrowly, the court of appeals fundamentally misconstrued the adaptable design of the National Bank Act and ignored the central, congressionally assigned role of the Comptroller in administering the national banking laws. The panel's errors in this important area of federal law merit review by this Court.

1. Congress crafted a flexible statutory scheme to govern national banks. "[T]he National Bank Act did not freeze the practices of national banks in their nineteenth century forms," and "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977).

In particular, Section 24 Seventh imbues national banks with "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24 Seventh. The Comptroller determined that banks possess the power to sell annuities pursuant to this "incidental powers" clause. App. 37a-41a. In overturning this determination, the court of appeals ignored the flexibility afforded by the

provision and adopted an interpretation that does violence to the very purpose of the incidental powers clause—to allow the business of banking to evolve to meet changing market and consumer demands.

This flexible character is reinforced by the recent judicial interpretations of an identical provision of New York law that, significantly, is the predecessor of the incidental powers provision of Section 24 Seventh.[3] The interpretation of the New York statute accordingly is instructive as to the meaning of the federal clause.[4] New York's intermediate appellate court recognized that "the incidental powers clause has as its purpose events in futuro," *New York State Ass'n of Life Underwriters v. New York State Dep't of Banking*, 190 A.D.2d 338, 342, 598 N.Y.S.2d 824, 827 (1993), *aff'd*, 83 N.Y.2d 353, 1994 N.Y. LEXIS 324 (1994), and held that the sale of annuities is "an 'incidental power' of the 'business of banking,'" 190 A.D.2d at 344, 598 N.Y.S.2d at 829. The New York Court of Appeals affirmed, stating that "the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service." 1994 N.Y. LEXIS at *10.[5] The incidental powers provision of Section 24 Seventh does not freeze the "business of banking" in time but instead allows "banks to expand their banking services over time consistent with evolving business practices and their

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[3] Symons, *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676, 689 (1983).

[4] *See* 2B N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 51.01, 51.06 (5th ed. 1992).

[5] The New York rulings were based upon *Curtis v. Leavitt*, 15 N.Y. 9 (1857), which was decided six years before Congress enacted the National Bank Act. Congress doubtless was aware of the purpose of New York's incidental powers clause when it included identical language in the federal statute. *See Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431 (1st Cir. 1972) ("[W]e are willing to assume that Congress entertained these views when it enacted the National Bank Act.").

customers' needs." 190 A.D.2d at 341, 598 N.Y.S.2d at 827.

The court of appeals' analysis in this case disregards entirely the prospective orientation of the National Bank Act and Section 24 Seventh. The decision below would freeze the business of banking as it eixsted when the banking laws were enacted.[6]

The court of appeals also said that "[e]ven conceding arguendo that the power to sell annuities would be incidental to banking, by no stretch of the imagination can that power be deemed to be '*necessary*.'" App. 15a (emphasis added). This analysis, however, construes the word "necessary" in a manner that consistently has been rejected by federal courts for over two decades. Instead, the courts generally construe an activity to be a permissible form of the business of banking under Section 24 Seventh if the activity is "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972); *see also M & M Leasing Corp.*, 563 F.2d at 1382; *Securities Industry Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990). *Cf. American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988) (finding even the "convenient and useful" test of *Arnold Tours* to be unduly restrictive).

2. Congress empowered the Comptroller to administer this flexible regulatory scheme:

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[6] The court of appeals made a similar error in *Saxon v. Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968). There the court of appeals looked to the business of banking as it had existed in 1916 to determine whether a national bank could operate an insurance agency under the incidental powers clause of Section 24 Seventh.

> [C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04 (1987) ("*Clarke v. SIA*") (citing *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971)); *see also* 12 U.S.C. 26 (Comptroller's chartering authority), 211(a) (rulemaking authority), 1818 (enforcement authority).

While Congress intended the activities of national banks to develop over time, their evolution was made subject to the supervision of the Comptroller. The Comptroller is expert in this complex area of law and business and has been charged with ensuring the orderly development of the national banking system consistent with sound banking standards. It is this pervasive regulatory structure, administered by the Comptroller, that has allowed the business of banking to evolve and meet the challenges of the contemporary financial services market, though the structure of the National Bank Act has remained essentially unchanged for over a century.

Whether the sale of annuities is an "incidental power" under Section 24 Seventh is in the first instance for the Comptroller to determine. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Clarke v. SIA*, 479 U.S. at 403-04. Ignoring this fundamental principle of administrative law, the panel instead rendered its own interpretation, compounding its error by looking backward instead of forward. By substituting its own construction for that of the Comptroller, the court of appeals ignored the regulatory scheme established by Congress, in derogation of the instructions of this Court in *Chevron* and in *Clarke v. SIA*.

III. THE COURT OF APPEALS MISINTERPRETED SECTION 92 IN CONFLICT WITH THIS COURT'S DECISIONS AND WITH THE TEXT OF THE STATUTE.

The court of appeals held that 12 U.S.C. 92 prohibits national banks located in places with a population exceeding 5000 from selling annuities. App. 6a-17a. To reach this conclusion the panel had to determine (1) that annuities are "insurance," App. 10a-17a, and (2) that notwithstanding the incidental powers clause of Section 24 Seventh, the express *permission* granted by subsequently enacted Section 92 for national banks in small towns to sell "fire, life, or other insurance" constitutes an unspoken *prohibition* upon the sale of *any* type of "insurance" in a larger locality. App. 6a-10a. Both determinations were errors that, as demonstrated above, will injure greatly the public and the banking industry.

1. The court of appeals reached an absolutist determination that "annuities are . . . insurance." App. 10a. To support this unprecedented proclamation, the court of appeals observed that the sale of annuities is regulated under some state insurance laws and quoted a provision of the Internal Revenue Code of 1986—one saying nothing more than that insurance companies sell both life insurance policies and annuity contracts. App. 11a. As to the former basis, this Court long ago made clear that state law does not determine whether annuities are "insurance" for federal law purposes. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959) ("*SEC v. VALIC*"). From the latter basis, the court of appeals generalized, incorrectly, that federal laws "reflect the fact that annuities are an insurance product." App. 11a. This Court has also made clear that in the federal context it is the nature of the particular product under review that determines whether it is "insurance." *SEC v. VALIC*, 359 U.S. at 69; *see John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993) (holding that *each component* of the product

must be examined *separately* to ascertain whether it is insurance).

The court of appeals' decision conflicts with this Court's holding in *SEC v. VALIC*. There, the Court determined that variable annuities are not "insurance" within the meaning of the Securities Act of 1933 and Section 2(b) of the McCarran-Ferguson Act. In so doing, the Court rejected the contention—advanced by the same entity that is the respondent here—that annuities are "insurance" for the purposes of these two federal laws (albeit securities and insurance laws rather than banking laws).

Ignoring the Court's holding in *SEC v. VALIC*, the court of appeals relied upon Justice Brennan's tepid concurring observation that " 'the granting of annuities has been *considered* part of the business of life insurance.' " App. 10a (quoting *SEC v. VALIC*, 359 U.S. at 81 (Brennan, J., concurring) (emphasis added)). The court of appeals, however, overlooked the fact that Justice Brennan *concurred* with the Court's conclusion that variable annuities are not "insurance." Indeed, only two sentences after the language quoted by the court of appeals, Justice Brennan stated that the administration of variable annuities "involves a very substantial and in fact predominant element of the business of an investment company, . . . in any way totally foreign to the business of a traditional life insurance and annuity company." *SEC v. VALIC*, 359 U.S. at 81.

This Court reaffirmed the vitality of *SEC v. VALIC* only last December. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517 (1993). In analyzing whether the contract at issue in *John Hancock* was a "guaranteed benefit policy" exempt from certain aspects of the Employee Retirement Income Security Act, the Court looked to its "decisions construing the insurance policy exemption [of] the Securities Act of 1933." *Id.* at 527. In conducting this analysis the Court examined each

component of the contract to determine whether that component allocated risk to the insurer.

John Hancock and *SEC v. VALIC* demonstrate the error of this aspect of the decision below. *SEC v. VALIC* made clear that application of the term "insurance" for federal securities law purposes requires scrutiny of a product's risk allocation. *John Hancock* underscored this point by instructing that the risk allocation for *each component* of a contract must be examined separately. The Fifth Circuit undertook no such analysis, relying instead on inapposite definitions in Black's Law Dictionary and a single citation to the Internal Revenue Code to support its conclusion that annuities are "insurance" for all purposes.[7] That conclusion cannot be squared with the teachings of *SEC v. VALIC* or *John Hancock*.

2. The court of appeals further erred by determining that because Section 92 *added* to the existing authority of national banks in small towns, Section 92 perforce must have *detracted* from the authority of banks located elsewhere. App. 3a, 6a-7a. This error perpetuates the misinterpretation of Section 92 by a prior Fifth Circuit decision, *Saxon v. Georgia Ass'n of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968).

Whether Section 92 somehow impliedly restricts the power of national banks in towns of more than 5000

[7] Indeed, as the dissenters from the denial of rehearing *en banc* noted, the panel ignored not only this Court's rulings but also Fifth Circuit precedent that annuities are not insurance for purposes of state law. App. 27a. *In re Newman*, 993 F.2d 90 (5th Cir. 1993), held that an annuity contract is a "general intangible" for purposes of Texas commercial law. Significantly, "insurance" is expressly exempted by Texas law from the definition of general intangibles. If annuities were "insurance," they could not be "general intangibles." *See also In re Young*, 806 F.2d 1303, 1306 (5th Cir. 1987) ("an annuity is essentially a form of investment") (quoting *In re Howerton*, 21 B.R. 621, 623 (Bankr. N.D. Tex. 1982)). The inability of the court of appeals to resolve this conflict *en banc* further demonstrates the need for resolution by this Court.

residents to sell insurance—despite the language of Section 92 that grants powers "[*i*]*n addition* to the powers now vested by law" [8]—is itself an important federal question meriting resolution by this Court.[9] The courts of appeals have been unable to agree on this issue. The court of appeals here relied upon the assertedly "plain language" of Section 92. App. 3a; *accord Saxon*, 399 F.2d at 1013-16. The Eighth Circuit has taken a contrary view: "There is a strong argument that *Saxon* was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance." *Independent Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 736 F.2d 468, 477 n.6 (8th Cir. 1984). So has the D.C. Circuit: "By its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 n.18 (D.C. Cir. 1979) (authorizing sale of credit life insurance). This important conflict among the circuits, which is underscored by the court of appeals' decision, merits resolution by this Court.

Contrary to the position of the Fifth Circuit here and in *Saxon*, Section 92 does not address the authority of banks located *outside* of small towns to act as agents for insurance companies. Indeed, as the conflict among the circuits demonstrates, the language of Section 92 is anything but plain in this respect. This Court should grant certiorari to consider this important issue as well as the issue of the scope of Section 24 Seventh.

[8] "In addition to the powers now vested by law in national banking associations organized under the laws of the United States any association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company." 12 U.S.C. 92.

[9] See Question Presented, No. 2, Petition of NationsBank at i.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petitions for writ of certiorari.

Respectfully submitted,

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